UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FLAMINGO LAS VEGAS OPERATING COMPANY, LLC

and **Cases 28-CA-077145**
28-CA-079092

INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA)

and

CHRIS RUDY, an Individual **Case 28-CA-078866**

BRIEF IN SUPPORT OF ACTING GENERAL COUNSEL'S EXCEPTIONS

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I. INTRODUCTION

The Administrative Law Judge (the ALJ) erred by failing to address the Section 8(a)(1) allegation that Flamingo Las Vegas Operating Company, LLC (Respondent) promulgated and enforced an overly-broad and discriminatory work rule prohibiting its employees from engaging in Union activities in violation of the National Labor Relations Act (the Act). The ALJ made factual findings regarding the meeting between Respondent's Security Director Eric Golebiewski (Golebiewski) and Security Officer Francis Bizzarro (Bizzarro), but failed to issue a ruling on the allegation. (ALJD 4:37-47, 5:1-21)[1] Further, the ALJ's simplified version of the testimony omits the extremely limited nature of the conduct which Respondent allegedly relied upon in confronting what it considered "harassment" of

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[1] ALJD__:_ refers to page followed by line or lines of the ALJ's decision in JD(SF)-56-12 (Dec. 18, 2012); GCX___ refers to General Counsel's Exhibit followed by exhibit number; JTX ___ refers to Joint Exhibit followed by exhibit number; "Tr. _:__" refers to transcript page followed by line or lines of the unfair labor practice hearing held July 31 to August 3, and August 21 and 22, 2012.

other employees about the representation vote for the International Union, Security, Police and Fire Professionals of America (SPFPA) (Union). The Board should find that, by calling Bizzarro to the office, telling him he could not "harass" security officers about how they voted in the election, and that there would be an NLRB complaint if it continued, the Respondent promulgated and enforced an overly-broad and discriminatory work rule prohibiting Union activities as alleged in the consolidated complaint.

The ALJ also erred by failing to find that, during the same conversation, that Respondent disciplined Bizzarro in violation of Section 8(a)(3) of the Act by telling him that this was his warning. (Cf. ALJD 4:39-42; 5:14-21) The ALJ's finding is contrary to the great weight of the evidence, including his previous finding that Bizzarro was a credible witness and discrediting of Golebiewski as providing cursory denials. (ALJD 4 fn. 3; 5:14-17) Further, the failure to find that Respondent warned Bizzarro is contrary to any logical inference, especially when the ALJ had previously found that Respondent expressly told Bizzarro that if his "harassment" continued, that an NLRB complaint would be filed against him. Instead, it follows that Respondent also told Bizzarro that this was his warning, especially when considering Respondent's other efforts to quell Bizzarro's activities on behalf of the Union. The failure to find that Bizzarro was threatened with a verbal warning under the circumstances goes against the prior credibility resolutions, the amount of direct attention Respondent focused on Bizzarro, the threat of NLRB action against him, and the sound logical inference that Respondent wanted Bizzarro to stop his activities on behalf of the Union.

Third, the ALJ erred in failing to find that Respondent terminated Security Officer Thomas Willequer because of his Union activities. From the credited testimony, the Board

should find that the Union activities of Respondent's employees accounted for the discharge of Willequer. The ALJ focused on the lack of Union activities by Willequer at or near the time of his discharge, and the absence of knowledge of those activities by Respondent in dismissing the allegation that Respondent discharged Willequer because of his Union activities. (ALJD 9:43, 10:1-11) While facially correct, the ALJ's superficial analysis fails to take into account the credited testimony that Respondent had tolerated prior misconduct by Willequer before it discharged him in February 2012.[2] Further, by discharging Willequer when it had tolerated his misconduct in the past, Respondent made real the earlier caution by its Director of Security that with the Union present, Respondent would lack the flexibility to overlook misconduct and give its employees another chance when considering discharge.

Finally, the ALJ erred in failing to find that Respondent disciplined Security Officer Chris Rudy (Rudy) because he gave testimony to the Board against Respondent in violation of Sections 8(a)(3) and (4) of the Act. The ALJ correctly found that Rudy had given testimony to the Board in the prior proceeding, including providing an affidavit which was shared with Respondent at hearing. (ALJD 5:33-35) The ALJ found that Rudy responded to a fight on the public sidewalk days later on March 31, following a customer report and Rudy's radio report to dispatch. Rudy then proceeded to the area of the fight when backup arrived. (ALJD 5:37-47) However, the ALJ focused on the "minute" that Rudy waited for backup before proceeding, and only mentioned that Rudy was "on duty" while failing to describe that this meant that Rudy was generally obligated, under penalty of discipline, to remain on post in the absence of supervisor permission to leave. Further, the ALJ failed to mention the number of requirements in the Security Officer Manual which restricted Rudy's ability to leave his post,

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[2] All dates are in 2012, unless otherwise noted.

respond to the fight, or to do more than he did. Moreover, the ALJ made no mention of the lack of discipline issued to the responding security officer who left her post, responded to a dangerous situation without backup with malfunctioning equipment, and placed herself in harm's way in violation of the obligations placed on security officers by Respondent. The Board should find that Rudy's prior Board testimony was the reason which prompted Rudy's discipline, and not the "minute" Rudy remained on post before it was confirmed by video surveillance that there was an actual fight. Further, the Board should find that Respondent would not have disciplined Rudy in the absence of his prior Board testimony. Accordingly, the Board should find that Respondent violated Sections 8(a)(1), (3), and (4) of the Act when it issued the discipline to Rudy.

II. FACTS

A. Respondent's Operations

Respondent is a limited liability company with an office and place of business in Las Vegas, Nevada, and is engaged in the operating of a hotel and casino. (ALJD 2:40-42; GCX 1(n); 1(y)) Respondent operates one of five properties in a "pod" under Caesars Entertainment. (Tr. 67:18-23) The properties in the pod are Harrah's, Imperial Palace, Flamingo,[3] which includes the Margaritaville Casino, OSheas, and Bill's, or HIFOB for short. (Tr. 67:6-8) Security Director Eric Golebiewski oversees HIFOB security operations. (Tr. 66:20; 69:4-6) Respondent's operations require security officers 24 hours a day, 365 days a year, with approximately 300 security officers among the HIFOB properties. (Tr. 72:23-25; 73:25, 74:1-2) The security officers rotate through various HIFOB posts where they are

[3] Most references to Respondent's facility refer to its Flamingo facility, although there is interaction among some of the properties, especially Flamingo, OSheas and Bill's.

obligated to stay until relieved unless directed otherwise by a supervisor or by dispatch or in the case of an emergency. (Tr. 79:5-22; 82:13-16; 87:1-17; 265:17-18; 315:1-8; GCX 3(h); GCX 11; GCX 12(b) at 4-12; GCX 12(c); GCX 46) The Margaritaville Casino is a post with defined boundaries which do not include the public sidewalk. (Tr. 266:8-17; 267:21-24; 270:18-23)[4]

B. Meeting Between Security Director Eric Golebiewski and Security Officer Francis Bizzarro

The credited testimony of the ALJ shows that on April 14, following the March 29 election, Bizzarro met with Golebiewski and Security Manager Charles Willis (Willis) in Golebiewski's office (ALJD 4:37-38) and was told that "security officers were complaining about Bizzarro harassing them . . . about how they voted in the election." Golebiewski admitted telling Bizzaro that he "can't harass these guys on the casino floor." Willis testified that Golebiewski said that if it continued "we'd be seeking an NLRB complaint against [Bizzarro]." (ALJD 5:8-12) The ALJ credited the testimony of Golebiewski and Willis and did not credit Bizzarro to the extent that it differed. (ALJD 5:14-15) Because of this, he did not credit that Bizzarro was told this was his warning.

Although the ALJ cited portions of Willis' testimony, he made no mention of the testimony of a complaining security guard involved who also testified. Security Officer Harold Kea (Kea) testified for Respondent that after the vote, Bizzarro said he did not "understand the reason why you guys aren't voting for me, why you're not supporting me." (Tr. 870:9-13) Kea said it was done, stopped shaking hands with Bizzarro, and moved on. (Tr. 870:13-15) The conversation lasted a total of 20 to 30 seconds. (Tr. 870:16-17)

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[4] The transcript incorrectly states "post" as "pub."

Afterward, Kea told Willis what happened and said that he did not "want to deal with it now. I'm done, it's over, I'm done." (Tr. 870:18-24) Kea and Bizzarro did not have any following conversations about the Union. (Tr. 871:5-10; 873:3-10) Kea did not report to management that he felt he was being harassed or that he had been threatened. (Tr. 875:7-25, 876:1-5)

C. Discharge of Thomas Willequer

As found by the ALJ, Respondent had issued Willequer two final warnings before his discharge:

> • Final Written Warning on November 21, 2010 for putting himself in harms [sic] way by engaging in a melee involving a fight between patrons prior to backup arriving on the scene.
> • Final Written Warning on July 3, 2011 for making offensive comments to a guest including profanity and references to the guest's sexual preferences.
> The warning states, "You admitted at your interview and in your statement that you used profanity and made remarks regarding sexual preference." (ALJD 8:7-13)

Each of these warnings provided:

> CONSEQUENCE if behavior continues: Progressive discipline, up to, and including termination (GCX 3(i)) or separation (GCX 3(j)).

The ALJ found that Respondent discharged Willequer for his conduct of February 6, specifically, an error in a chip fill in which he participated and being on his personal cell phone while on duty in the cage area. (ALJD 8:36-38) In his decision, the ALJ explained both of these actions by Willequer. Concerning the chip fill, the ALJ found that Willequer admitted that the rack of chips he delivered to a gaming table was incorrect in that "there were supposed to be $1000 in green chips but instead there were $1500 in green chips." (ALJD 8:42-44) The ALJ found that neither the dealer nor the pit boss caught the mistake. (ALJD 8:44) In addition, the cage cashier who collected the chips was also involved in this fill error. (Tr. 715:6-12)

Concerning the use of the cell phone, Willequer admitted using his cell phone to place two calls to the control office at the adjacent casino owned and operated by Respondent or its parent where Willequer was scheduled to work following his shift at Respondent. (ALJD 8:46-50) In the calls, Willequer explained that he would be late relieving the recipient of the call. (ALJD 8:50-54) As characterized by the ALJ, "[t]his was a business call, and not a personal call." (ALJD 8:54) Willequer explained that he did not use his issued radio because he did not want others listening to his conversation, while acknowledging that it is common practice to communicate information about lunch breaks via the radio. (ALJD 8:54-56, 9:1-2)

Following her investigation, and considering the prior discipline of Willequer that included his two final warnings, Respondent's Labor Relations Advisor Elma Padaguan recommended termination to Respondent's Director of Security Golebiewski who agreed. (ALJD 9:36-38) Four months before, on October 14, 2011, Golebiewski had explained to Willequer and six or seven others security guards:

> [T]hat if a union came in that he wouldn't be able to bend the rules for them, that with the union present, that there would be no flexibility and everything would be by the book and he wouldn't be able to use any of his influence to keep from terminating some of the officers. He pointed at [Willequer and two other employees] and said that they would be gone had it not been for him stepping in and essentially saving their jobs and if a union was present, he wouldn't be able to do that. (ALJD 3:30; 4:1-7)

He also explained that Willequer had "violations that would have ended, would have resulted in his termination had he [Golebiewski] not given him a more than a second or third chance[.]" (ALJD 4:11-13) The meeting was the only four-hour meeting held for Respondent's security officers, and was focused on Bizzarro's shift as Respondent had learned on October 7, 2011, of the organizing drive and Bizzarro's role as the Union organizer. (ALJD 3:30-40; 4:19-35)

The Union filed its first petition seeking to represent Respondent's security guards on November 4, 2011. It withdrew this and a subsequent petition, but proceeded to hearing on its third petition filed on November 23, 2011, in Case 28-RC-069491. On December 20, 2011, the Regional Director for Region 28 directed an election among Respondent's security officers, which election was scheduled for January 19. The scheduled election was postponed, pending the investigation and disposition of a blocking unfair labor practice charge. The election remained unscheduled at the time of Willequer's discharge. (JTX 1; GCX 1(l))

D. Testimony and Subsequent Discipline of Chris Rudy

The ALJ found that Rudy testified in the prior NLRB proceeding which was held March 13 to 16. (ALJD 2 fn. 1; 5:33-35) Rudy was on duty at the Margaritaville Casino just days later on March 31, when a person approached him and reported a fight on the public sidewalk adjacent to Las Vegas Boulevard. (ALJD 5:37-40) The fight location was outside the boundaries from Rudy's post at the Margaritaville casino. (Tr. 314:18-22) Rudy walked outside the doors, reported the call to dispatch by radio, but could not verify the fight from where he was standing. (ALJD 5:40-45) About a minute later, after he was joined by another security officer, Rudy started walking toward the group of people. (ALJD 5:46-47) The surveillance camera panned to the fight at 6:51:56, just 62 seconds after Rudy appeared outside the doors, and 46 seconds after he is seen using his radio. (Tr. 159:4-18; GCX 39) At approximately the same time, dispatch confirmed the fight by video surveillance cameras, reported over the radio that there was a fight and that a security officer was by herself at the fight. (ALJD 5:47-49) Rudy and the other security officer ran to the scene, arriving within seconds of the dispatch call. (Tr. 269:5-9; 272:4-11; 290:15-20; 325:5-10; GCX 39)

Surveillance video shows the first security officer appeared at 6:52:34, and Rudy arrived at 6:52:35. (Tr. 163:2-9; GCX 39) Rudy participated in the intervention by removing one of the combatants by 6:52:52. (Tr. 163:24-24, 164:1-5)

Respondent, by day Shift Supervisor Minor, first confronted Rudy because he did not back up Security Officer Shaqual Starks (Starks). (Tr. 273:12-21; 293:21-24; 736:11-15; 737:22-23) No discipline was issued at that time, but Rudy was called to the supervisor's office about a week later when Minor gave him a written warning for failing to respond to a fight instead of for failing to back up Starks. (Tr. 275:13-19) When Rudy told Minor that he did not respond because he did not have backup, Minor told him that his backup (Starks) was already there. (Tr. 276:2-4)

When Rudy asked Security Investigations Manager Jack Burgess (Burgess) why he was getting a written warning instead of a coaching since he had never received any prior discipline, Burgess told him that this "was so egregious" that he could skip any disciplinary steps he deemed appropriate. (Tr. 278:23-25, 279:1-4) Prior to this warning, Rudy had not received any discipline. (Tr. 279:5-7) Golebiewski, against whom Rudy previously testified as to violations of the Act he committed in the prior proceeding, was the person who determined that Rudy would be disciplined. (Tr. 137:2-4, 8-9, 14-16; 138:8-25, 139:1-7; 184:4-6)

The ALJ briefly discussed the Board of Review which Rudy participated in to review the discipline issued, which resulted in a modification of the written warning that it would be reduced to a verbal if no further discipline occurred within six months. (ALJD 6:37-49) The employee under review cannot select any of the members of the Board of Review. (Tr. 683:8-17) Rudy informed the Board that he was on post and could not leave without supervisor or

dispatch permission, but the Board of Review did nothing to verify Rudy's claim that he should not have gone to the fight without permission, including its failure to call witnesses to rebut Rudy's claim, and failing to check the Security Officer Manual regarding backup or sidewalk requirements. (Tr. 677:1-25, 678:1-18; 679:25, 680:1-4)

III. ANALYSIS

A. The ALJ Erred by Failing to Find that Respondent Promulgated and Enforced an Overly-Broad and Discriminatory Work Rule Prohibiting its Employees from Engaging in Union Activities in Violation of Section 8(a)(1) of the Act [Exception No. 1]

Golebiewski's statement to Bizzarro that security officers had complained about conversations about the Union, and that if it continued he would file an NLRB complaint against him, was the implementation of a rule explicitly limiting Bizzarro's Section 7 rights to discuss the Union with other employees. The implementation of a rule is even clearer if the Board considers the warning given to Bizzarro as discussed in Exception 2, below. This rule is an explicit restriction of Section 7 rights and there are no legitimate reasons to justify Respondent's rule, especially in light of the minimal statements attributed to Bizzarro upon which Respondent relies.

Golebiewski's statements are unlawful even if it is not found to be an explicit restriction on Section 7 rights. Employees would reasonably construe Golebiewski's statements to prohibit discussions about the Union, especially in light of the minimal conversations upon which Respondent relies. Further, the rule was unlawfully created in response to Union activity – discussing the Union with co-workers. Cf. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-647 (2004) (holding that a violation may be found if the rule was promulgated in response to union activity). Respondent is unable to point to any

legitimate interest or concern where there was no harassment, threats, or similar conduct by Bizzarro. As shown by the testimony of Security Officer Kea, the brief and non-harassing nature of the discussion upon which Respondent supposedly relied does not support a claim that its rule was justified based on the "harassment" of security officers, especially when it was implemented in response to Union activity. In short, Respondent had no lawful basis for implementing the rule. Cf. *Boulder City Hospital,* 355 NLRB 1247, 1248 (2010) (persistent union solicitation that annoys or disturbs the employees being solicited is protected activity).

The Board should find that Golebiewski's statements to Bizzarro that security officers had complained about conversations about the Union, that it would file an NLRB complaint if it continued, was the promulgation of an overly-broad and discriminatory work rule prohibiting its employees from engaging in Union and concerted activities as alleged in the consolidated complaint paragraph 5(g).

B. The ALJ Erred by Failing to Find that Respondent Disciplined its Employee Francis Bizzarro Because He Formed, Joined, or Assisted the Union and Engaged in Concerted Activities and Because he Violated an Overly-Broad and Discriminatory Work Rule in Violation of Section 8(a)(3) of the Act [Exception No. 2]

As previously discussed regarding Exception 1, Golebiewski informed Bizzarro about security officer complaints against him for talking about the Union. Further, Bizzarro testified that Golebiewski told him that this was his warning. (ALJD 4:37-42) A verbal warning is one form of Respondent's discipline, and is not the lowest form of discipline issued as informational entries and documented coachings are each lower levels of discipline than a verbal warning, which is lower than a written warning. (Tr. 717:23-25, 718:1-2; GCX 3(b) at 2.11; GCX 6(g); GCX 43) The failure to find that Bizzarro was told this was his warning does not make sense based on the other credited findings. It logically follows that,

where Respondent took the time to confront Bizzarro, told him the express threat that if it continued there would be an NLRB complaint against him, that Respondent also told Bizzarro that this was his warning. The failure to so find is even more astounding given the amount of negative attention given to Bizzarro's actions as the Union's organizer as found by the ALJ's findings regarding the four-hour meeting and the discrediting of Golebiewski's cursory denials. (ALJD 3:30-55, 4:1-35; 4 fn. 3) The lack of documentation does not excuse the disciplinary nature of the warning issued, which was reinforced by Golebiewski's reference to further action in filing charges with the National Labor Relations Board. A violation can be found based on the verbal warning to discontinue "harassing" other security officers about the Union, even in the absence of a written document and in the absence of other adverse employment action. *Altercare of Wadsworth Center for Rehabilitation*, 355 NLRB 565, 565-566 (2010) (finding verbal warnings unlawful in part because they were part of the progressive disciplinary system and were taken into consideration in determining discipline for future infractions). The Board should find that Respondent disciplined Bizzarro because of his Union activities and because he violated the overly-broad and discriminatory work rule as alleged in consolidated complaint paragraph 6(e).

C. The ALJ Erred by Failing to Find that Respondent Unlawfully Suspended and Subsequently Discharged its Employee Thomas Willequer Because He Formed, Joined, or Assisted the Union in Violation of Section 8(a)(3) of the Act [Exception No. 3]

Respondent's discharge of Willequer was a result of the Union activities in which he and the other employees engaged. Respondent had shown a past willingness to excuse Willequer's misconduct. The conduct at issue in February was undistinguished and unrelated to the prior misconduct. Willequer and three others made a mistake in a chip fill. That same night, he placed two "business calls" to a security officer at Respondent's adjacent property,

explaining that he would be late relieving the officer. Neither of these "offenses" considered separately or together appears to warrant discharge, especially considering the prior misconduct by Willequer which resulted in consecutive final warnings. The difference here was the efforts by Respondent's employees to secure union representation. By discharging Willequer, Respondent's Director of Security Golebiewski made good his earlier caution that his past ability to "bend the rules" and show flexibility in discharging employees would no longer be available if the Union came to represent employees. Obviously, his threat did not have its intended result of stopping unionization, since employees continued to support the Union to the point that it filed a representation petition to become the collective-bargaining representative of Respondent's employees. Surely, the pre-election discharge in the face of prior tolerance would have the effect of discouraging employees from supporting the Union. The Board should so find, as alleged in the consolidated complaint (GCX 1(n)), that the discharge of Willequer was to discourage employees from engaging in Union activities.

D. The ALJ Erred by Failing to Find that Respondent Unlawfully Suspended and Subsequently Disciplined its Employee Chris Rudy Because He Gave Testimony Under the Act in Violation of Section 8(a)(3) and (4) of the Act [Exception No. 4]

There are several factors which show that Rudy's testimony in the unfair labor practice proceeding was a motivating factor in Respondent's decision to issue discipline, including timing. The incident occurred just days after Rudy testified against Respondent and testified about violations alleged to have been committed by Security Director Golebiewski. Cf. *Mid-West Telephone Service, Inc.*, 358 NLRB No. 145, slip op. at 1 fn. 2, 18 (2012) (timing supported an inference where the employer learned shortly before that the employee gave an affidavit and was willing to testify); *Toll Mfg. Co.*, 341 NLRB 832, 833 (2004) (timing and abruptness of discipline were "persuasive evidence" of motive). Animus is also

demonstrated by the fact that Golebiewski made the decision to discipline Rudy – the very person Rudy testified against less than a month earlier. Further, Respondent changed the reason to issue discipline from failing to backup Starks to failing to respond to a fight – *even though he responded to the fight.* Respondent's shifting justifications to issue discipline, and splitting-hair nature of issuing discipline when Rudy responded seconds after the surveillance camera confirmed the fight, also shows Respondent's effort to create a justification to discipline Rudy. Moreover, Respondent skipped progressive discipline for Rudy, an employee who had never received prior discipline. Enhancing discipline in such circumstances gives rise to an inference that the discipline was issued in response to protected activity. *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1237 (2004); *Teksid Aluminum Foundry*, 311 NLRB 711, 723 (1993).

Respondent would not have disciplined Rudy but-for his prior Board testimony. Respondent's witnesses confirmed that they are to do no more than observe and report without the necessary level of backup *even where a security officer has backup with them.* The idea behind backup in a fight is an overwhelming superiority of manpower to show up when responding to a fight.[5] (Tr. 576:21-25; GCX 14(b)) Shift Supervisor Janice Miller testified to a fight she observed around the end of May 2012, where she and another officer responded to a report of a fight. Miller and the other officer saw a fight, called for backup, and waited until more backup arrived before engaging. (Tr. 558:8-10, 25, 559:1-16) Neither Miller nor the other security officer were disciplined for only observing, reporting, and

[5] "In order to properly control or avoid a potential physical confrontation superiority of manpower should be utilized. The more the manpower the easier the job and less danger for all concerned. At least two officers per suspect, **NO EXCEPTIONS!**" (Tr. 96:9-12, 23-25, 97:1-8; GCX 14(b))

waiting for backup before engaging the fight even though they had each other as backup. (Tr. 567:1-16) Additionally, Miller stated during Respondent's redirect examination that:

> Q Is it true also that sometimes security officers might respond on their own if they are available?
> A That's correct.
> Q Without being dispatched or ordered to respond?
> A That's correct. *We were just talking about the ones that's on a post that would get authorization*, but *if they're not available and not on post, then they would respond without being told.* (Tr. 576:9-16) (emphasis added)

Further, Security Officer Keith Bash, a 25 ½ year security officer employee, testified that Rudy was doing what he was supposed to do, observe and report without being obligated to do more. (Tr. 346:23-25, 347:1-9) Bash also corroborated Rudy's testimony that security officers have been told they are not required to respond to fights on the sidewalk even though they have responded in the past. (Tr. 333:3-7, 18-25, 334:1-10) Moreover, security officers have been written up for responding on the sidewalk. (Tr. 334:11-19)

In contrast to the discipline issued to Rudy, Starks, who was on post at OSheas, left her post following a report by a passing jogger that there was a fight in front of the Margaritaville restaurant.[6] (Tr. 893:9-13) She did not have backup when she left her post, did not obtain supervisor or dispatch permission before leaving her post, or even call in the report of a fight before she left her post, even though she knew that a report of a fight is not considered an emergency sufficient to leave her post without permission. (Tr. 893:23-25, 894:1-8; 904:25, 905:1-3, 18-25, 906:1-12) She moved into the immediate vicinity of the combatants before calling on the radio that there was a fight. (Tr. 894:9-17) Starks'

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[6] The Margaritaville restaurant (or café) and Margaritaville casino are two different portions of HIFOB properties. The Margaritaville restaurant was closed at the time and did not have its own security officer at the time. Respondent's security officers are not posted at the Margaritaville restaurant even when it is open.

proximity to the fight was a violation of several of Respondent's policies in the Security Officer Manual, but yet she received no discipline. (Tr. 307:13-16) The fact that Respondent did not issue discipline to Starks when it appeared that she violated several provisions of the Security Officer Manual, and provided no evidence that it disciplined other security officers for situations similar to Rudy makes clear that Respondent would not have issued discipline to Rudy but for his prior unfair labor practice testimony.

Rudy did what he was required to do; he moved to a position without leaving his post where he could report what he observed. He waited for backup and then moved toward the large group of people on the west sidewalk. When dispatch and surveillance heard Rudy's call, the cameras were repositioned to learn what was happening on the sidewalk. Once dispatch learned Starks was at the fight, the call was made to provide assistance. Rudy, who was already proceeding to the fight, arrived seconds later. Even under Respondent's backup requirements, Rudy could not have engaged the combatants, even if he was with Starks, without a minimum of four security officers present. Respondent's argument that Rudy was obligated to do more would put Rudy in a true dilemma; he was disciplined for his actions even though he responded, but would have risked discipline for leaving his post or responding without backup if he had responded in the manner claimed appropriate by Respondent. Respondent provided no evidence that it disciplined other employees in situations similar to Rudy.

Respondent failed to prove that it would have issued the discipline in the absence of Rudy's testimony at hearing. It offered no evidence that it has issued discipline in the past for failing to respond to a fight on the sidewalk, or further, that it has *skipped a step* in the progressive discipline system for a failure to respond to a fight on the sidewalk. Further, in

addition to the failure to provide evidence of any discipline issued under those circumstances, it failed to offer any evidence that it has issued discipline for a failure to respond *where the security officer did in fact respond when backup arrived.* The discipline admitted into evidence shows that Respondent has disciplined security officers *when they were away from their post without permission.* Additionally, the evidence introduced shows that there are many restrictions on security officers in Rudy's situation, including the requirement to stay on post absent supervisor or dispatch permission to leave the post (Tr. 87:2-17; GCX 12(b), (c)), and the numerous requirements to have backup prior to approaching a potentially confrontational situation. Further complicating Respondent's position is the fact that the portion of the sidewalk in question is in front of an area that Respondent does not patrol – the Margaritaville restaurant – an area which is operated by a vendor and which the security officers are directed to maintain a minimum contact. (Tr. 89:9-14; GCX 12(d)) Under these circumstances, Respondent has not shown that it would have issued the written warning to Rudy in the absence of his providing testimony and an affidavit in a Board proceeding.

The Board should find that Rudy's testimony in the prior unfair labor practice hearing was a motivating factor in the decision to issue discipline. Further, the Board should find that Respondent has not met its burden of showing it would have disciplined Rudy, including skipping a level of discipline, in the absence of his participation in the prior unfair labor practice proceeding. Thus, the Board should find that Respondent disciplined Rudy for giving prior testimony under the Act as alleged in consolidated complaint paragraphs 6(d), and 6(g).

IV. CONCLUSION

Based on the foregoing, the General Counsel respectfully requests that the Board reverse the ALJ's erroneous rulings as set forth above, and find that Respondent committed

the additional violations of Section 8(a)(1), (3), and (4) as discussed above, and affirm the remaining findings of the ALJ.

Dated at Las Vegas, Nevada, this 15th day of January 2013.

/s/ Larry A. Smith

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CERTIFICATE OF SERVICE

I hereby certify that a copy of BRIEF IN SUPPORT OF ACTING GENERAL COUNSEL'S EXCEPTIONS in FLAMINGO LAS VEGAS OPERATING COMPANY, LLC, Cases 28-CA-077145, 28-CA-079092, and 28-CA-078866, was served by E-Gov, E-Filing, and E-Mail, on this 15th day of January 2013, on the following:

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